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9. Water and Water Courses (§ 86*)—Diminution of Water Supply—Punitive Damages—Public Service Corporation.—In an action for damages for diminution of plaintiff's water supply by a railway company, punitive damages were not properly allowable where defendant, being a public service corporation, was obliged to use the water and required time to find another source of supply.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 681.]

Sims, J., dissenting.

Error to Circuit Court, Prince Edward County.

Action by A. C. Allen & Sons against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. S. Kirkpatrick, of Lynchburg, for plaintiff in error.

E. Warren Wall, of Farmville, and *W. M. Justis, Jr.*, of Richmond, for defendant in error.

J. C. LYSLE MILLING CO. *v.* S. W. HOLT & CO.

March 21, 1918.

[95 S. E. 414.]

1. Trial (§ 59 (2)*)—Reception of Evidence—Order of Proof.—The order in which proof may be introduced is a matter in the discretion of the trial court.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 597.]

2. Principal and Agent (§ 124 (3)*)—Authority—Question for Jury.—In an action for damages for the nonperformance of a contract to deliver flour, evidence held sufficient to authorize the submission to the jury of the salesman's authority to make the contract on defendant's part.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 248.]

3. Principal and Agent (§ 122 (1)*)—Proof—Declarations.—While the declarations of an agent are inadmissible to prove extent of agency, if the agency be otherwise prima facie proved they become admissible in corroboration.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 248.]

4. Appeal and Error (§ 702 (1)*)—Record—Instructions.—Where all the instructions are not certified, the giving of an isolated instruction does not constitute reversible error, unless it clearly appears that the instruction in itself was vitally wrong, and that other instructions could not have cured the error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 600.]

Error to Circuit Court, Elizabeth City County.

Action by S. W. Holt & Co. against the J. C. Lysle Milling

*For other cases, see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Company. Judgment for plaintiff, and defendants brings error. Affirmed.

Peatross & Savage, of Norfolk, for plaintiff in error.

J. Winston Read, of Newport News, for defendant in error.

ABERNATHY *v.* EMPORIA MFG. CO.

March 21, 1918.

[95 S. E. 418.]

1. Appeal and Error (§ 694 (1)*)—Review—Certification of Evidence.—Where the evidence and not the facts are certified, the case stands in the appellate court as on a demurrer to the evidence by the plaintiff in error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 577.]

2. Railroads (§ 485 (3)*)—Action for Setting Fire—Instructions.—In action for damages against an operator of a railroad for setting fire, an instruction that the burden was on plaintiff to show by a preponderance of evidence "how and why the fire occurred" and that the final burden was upon him to prove by a preponderance of the evidence that the origin of the fire was due to defendant's negligence, was not erroneous as requiring plaintiff to prove his case beyond a reasonable doubt.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

3. Trial (§ 228 (3)*)—Instructions—Propriety.—The mere fact that certain language has been used by the judge of an appellate court in rendering an opinion is not of itself sufficient to justify the use of the same language by a trial court in an instruction to the jury.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 714.]

4. Railroads (§ 485 (6)*)—Action for Setting Fires—Instruction.—In an action for damages, for setting fire, against an operator of a railroad, an instruction that even if the jury believed that the fire originated on a right of way by the emission of sparks, yet if such right of way was reasonably clear of combustible material, defendant was not liable, was erroneous as not including the necessary element that defendant's locomotive must have been equipped with the best appliances in known practical use, in good order, and carefully operated.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 138.]

5. Railroads (§ 485 (1)*)—Action for Setting Fires—Instructions.—In an action for setting fire to plaintiff's property by sparks from defendant's locomotive, an instruction that the burden of showing negligence was on plaintiff by preponderance of the evidence and that if the fire might have been started from one of two causes, for one of which

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